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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF FOR OLSON BODIES INC.
AS AMICUS CURIAE**

WILLIAM L. DENNIS

80 Pine Street

New York, New York 10005

Attorney for Amicus Curiae

Olson Bodies Inc.

Of Counsel:

DAVID A. MEAD

LAURENCE T. SORKIN

CAHILL, GORDON, SONNETT, REINDEL & OHL

80 Pine Street

New York, New York 10005

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Statement of Interest

This *amicus curiae* brief* is respectfully submitted on behalf of Olson Bodies Inc. (hereinafter "Olson Bodies") in support of the argument that an employer may not be found guilty of an unfair labor practice growing out of a disputed representation proceeding where the National Labor Relations Board (the "Board") has never reviewed its Regional Director's findings of fact in the underlying representation proceeding.

* This brief is filed with the written consent of both parties pursuant to Supreme Court Rule 42(2).

Like the petitioner in No. 370, Olson Bodies has been found guilty of an unfair labor practice solely on the basis of a Regional Director's findings of fact,* *NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187 (2d Cir. 1970), *petition for cert. filed*, No. 238, 1970 Term. As the Solicitor General noted in his Memorandum for the National Labor Relations Board in No. 238, Olson Bodies' petition for a writ of certiorari presents "essentially the same [question] as that presented in *Magnesium Casting Company v. National Labor Relations Board*, No. 370, 1970 Term" (Memorandum, pp. 1-2).

Like the petitioner in No. 370, Olson Bodies refused to bargain in order to challenge the representation decision of a Regional Director. In No. 238, Davenport's ballot was excluded by the Regional Director on the ground that Davenport was not a member of the bargaining unit. The result of the election was 110-109 in favor of the Union. 420 F.2d at 1188. If Davenport's ballot had been counted, and if the ballot had been cast against the Union, the vote would have been 110-110, and the Union would not have been certified. Thus, the Union's majority status (and the employer's corresponding duty to bargain) depends on the correctness of the Regional Director's unit determination with respect to Davenport. Olson Bodies is therefore vitally interested in the outcome of No. 370.

* The dispute in *Olson Bodies* involved the status of an employee named Davenport. Following the Regional Director's determination that Davenport was not a plant clerical employee, Olson Bodies filed a timely request for review under 29 C.F.R. § 102.67(c). The Board summarily denied the request without passing on the merits of the Regional Director's determination. Olson Bodies refused to bargain, and an unfair labor practice complaint issued. The Trial Examiner, relying on the Board's "rule against relitigation," refused to review the Regional Director's determination. The Board summarily affirmed the Trial Examiner, again without reviewing the merits of the Regional Director's determination relating to Davenport's eligibility.

Argument

The question presented is whether the Board is required to review the Regional Director's underlying representation decision in a subsequent unfair labor practice proceeding. The Courts of Appeals have divided three ways. In *Pepsi-Cola Buffalo Bottling Co. v. NLRB*, 409 F.2d 676 (2d Cir.), *cert. denied*, 396 U.S. 904 (1969), the Second Circuit held that the Board itself must decide whether an unfair labor practice has been committed, stating:

"The very fact that the Board has great discretion in making judgments, cf. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed. 228 (1953), especially in representation matters, *N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322 (1946), indicates a legislative purpose to confer final authority in these situations on the Board itself—not a sub-delegatee. . . . In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members.

• • •

"Although the legislative history of the Labor Act does not provide a clear answer to the question involved in this case, Congress' treatment of certain bills involving the Board also supports [the conclusion reached here]. For example, in 1961, the administration proposed reorganization plans for many federal regulatory agencies. These plans sought to increase the power of the agencies to sub-delegate authority to officials generally on the level of the

Board's regional directors. The N.L.R.B. plan would have given these officials the power to make final decisions, subject only to the discretionary review of the agency's members. Although provisions to this effect were enacted into law for the Federal Trade Commission, the Civil Aeronautics Board, and the Federal Maritime Commission, Congress rejected, after long and sometimes acrimonious debate, similar provisions which would have applied to the N.L.R.B., the Securities and Exchange Commission and the Federal Communications Commission. The reason for this carefully considered refusal was precisely that Congress was reluctant to authorize all hearing examiners to render final, unreviewable decisions." 409 F.2d at 680-81.

In *NLRB v. Clement-Blythe Companies*, 415 F.2d 78 (4th Cir. 1969), the Fourth Circuit also appears to have held that the Board must review the record in the representation proceeding before making its own decision in the unfair labor practice proceeding. The rationale in *Clement-Blythe*, as in *Pepsi-Cola*, was that "[t]he Board, not the Regional Director, has the responsibility of deciding complaints of unfair labor practice." 415 F.2d at 81.

In *NLRB v. Magnesium Casting Co.*, 427 F.2d 114 (1st Cir.), cert. granted, 39 U.S.L.W. 3131 (U.S. Oct. 13, 1970) (No. 370), the First Circuit refused to follow the Second Circuit's decision in the *Pepsi-Cola* case.* It held that the Board was not required to review the Regional Director's findings of fact before concluding that an employer had committed an unfair labor practice by its admitted refusal to bargain. Holding that the procedure followed by the Board "satisfies the requirements of the National Labor

* The Tenth Circuit has also refused to follow *Pepsi-Cola*. See *Meyer Dairy, Inc. v. NLRB*, 429 F.2d 697 (10th Cir. 1970).

Relations Act, the Administrative Procedure Act, and the demands of procedural fairness," 427 F.2d at 121, the court stated:

"Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the [Regional] Director's determination —when not set aside by the Board—is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded." 427 F.2d at 119.

In *NLRB v. Olson Bodies, Inc.*, *supra*, a different panel of the Second Circuit adopted a middle position, holding that Board review is required only where the issue "is difficult and requires a fine-drawn balancing of facts and law." 420 F.2d at 1190. Similarly, in *NLRB v. Bayliss Trucking Corp.*, — F.2d — (2d Cir. Oct. 28, 1970), a still different panel of the Second Circuit concluded that *Pepsi-Cola* should be limited to cases involving "difficult question[s] of mixed fact and law." — F.2d at —. Explaining that at least one of the employer's claims "totter[ed] on the brink of frivolity," the court stated: "We would not add to the Board's already long docket unless we were quite certain, as we were in *Pepsi-Cola*, that the Board's expert and informed views could be of substantial aid to the court's resolution of difficult issues." — F.2d at —.

I.

At the outset we submit that the First Circuit's holding in *Magnesium Casting* rests on a mistaken reading of the legislative history of amended Section 3(b) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 153(b), and should be rejected. Section 3(b), as amended, authorizes the Board "to delegate to its regional directors its powers under [Section 9] to determine the unit appropriate for the purpose of collective bargaining . . . [except that] the Board may review any action of a regional director delegated to him under this [section]." It should be noted at the outset that the powers which the Board is authorized to delegate under amended Section 3(b) are those which are conferred by Section 9. *The power to decide unfair labor practices is conferred by Section 10.* If Congress had intended to delegate the power to decide unfair labor practices as well, it would seem only logical that the 1959 amendment to Section 3(b) would make explicit reference to Section 10. Indeed, the delegation of Section 10 powers "would make so drastic a departure from prior administrative practice that explicitness [by Congress] would be required." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951) (Frankfurter, J.).*

It should also be noted that in 1961 Congress debated and ultimately rejected a bill which would have shifted the locus of decision-making power in unfair labor practice cases from the Board to its subordinates. See Auerbach,

* Similarly, in *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612, 640 (1967), this Court stated:

"Before we may say that Congress meant to strike from workers' hands the economic weapons traditionally used against their employers' efforts to abolish their jobs, that meaning should plainly appear. . . . We would expect that legislation [of this kind] would be preceded by extensive congressional study and debate, and consideration of voluminous economic, scientific, and statistical data."

Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners, 48 Minn. L. Rev. 823, 839 (1964); 107 Cong. Rec. 10223, 12905-32 (1961). This was several years after Congress enacted the 1959 amendment to Section 3(b). If the 1959 amendment did in fact authorize the Board to delegate the power to decide unfair labor practices, then the 1961 bill would have been wholly unnecessary. This only further confirms that the power to decide unfair labor practices was not among the powers delegated to the Regional Directors under amended Section 3(b).

It is also plain from the legislative history of the 1959 amendment that no delegation of Section 10 powers was intended. The purpose of amended Section 3(b) was to ease the Board's workload in representation cases and to speed the certification of bargaining units. See 2 *NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, 1714, 1749-50 (1959). At the same time, however, Congress intended that final authority would remain in the Board by permitting review of a Regional Director's representation decision at the unfair labor practice stage. See 2 *NLRB Legislative History*, 1811-12.

NLRB v. Duval Jewelry Co., 357 U.S. 1 (1958), does not compel a contrary result. *Duval* was decided prior to the 1959 amendment to Section 3(b), and does not involve the delegation of powers conferred by Section 10. Moreover, noncompliance with the *subpoena duces tecum* issued in *Duval* would not have subjected the employer to the potent sanctions arising from the finding of an unfair labor practice.

The First Circuit's holding in *Magnesium Casting* also rests in a mistaken reading of *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941). *Pittsburgh Plate Glass*

holds only that issues decided in a representation proceeding may not be relitigated in the subsequent unfair labor practice proceeding. It does not hold that the decisions of a Regional Director should be insulated from the scrutiny of the Board.

At the time *Pittsburgh Plate Glass* was decided, Congress had not authorized the Board's Regional Directors to decide representation cases. This meant that the issues in a Section 9 representation proceeding as well as those in a Section 10 unfair labor practice proceeding were determined by the Board itself; and this also meant that the same representation question would be before the Board *twice*. In *Pittsburgh Plate Glass*, this Court held that the Board was not required to review the same representation question twice, noting that the representation and unfair labor practice proceedings "are really one," 313 U.S. at 158, and "a single trial of the [representation] issue is enough." 313 U.S. at 162.

In *Pittsburgh Plate Glass*, the Board did in fact review the evidence adduced at the representation proceeding. 313 U.S. at 153-54. The same procedure was not followed in *Magnesium Casting*: the Board refused to review the Regional Director's determination under 29 C.F.R. § 102.67 (c),* and, relying on its "rule against relitigation," refused to review the Regional Director's determination at the unfair labor practice stage. The employer has thus been found guilty of an unfair labor practice without the Board having reviewed the representation decision even *once*. This is wholly inconsistent with the rationale of *Pittsburgh Plate Glass*, which would seem to require the Board to review the representation decision at least once before concluding that the employer has violated Section 8(a)(5).

* 29 C.F.R. § 102.67(c) provides that review will be granted only upon a showing of "compelling reasons."

Thus, the employer who has been unable to obtain direct Board review under 29 C.F.R. § 102.67(c) must commit an unfair labor practice to challenge a representation decision, and yet the effect of the Board's "rule against relitigation," as interpreted in *Magnesium Casting*, will be to preclude Board review at the unfair labor practice stage. This is to by-pass the Board entirely in practically all unfair labor practice proceedings arising out of a representation dispute. In 1966, for example, there were 427 requests for review in representation matters, but only 57 requests were granted. See 31 NLRB Ann.Rep. 15 (1966). The figures for earlier years show a similar pattern. See, e.g., 30 NLRB Ann.Rep. 15-16 (1965) (451 requests for review, 63 requests granted); 29 NLRB Ann.Rep. 17-18 (1964) (376 requests for review, 61 requests granted). It should also be pointed out that where the Board has granted review, the Board has reversed or modified its Regional Directors' determinations about 50 per cent of the time. See, e.g., 31 NLRB Ann.Rep. 15-16 (1966) (17 representation cases affirmed, 27 modified or reversed); 30 NLRB Ann.Rep. 15-16 (1965) (34 representation cases affirmed, 25 modified or reversed); 29 NLRB Ann.Rep. 18 (1964) (21 representation cases affirmed, 28 modified or reversed).^{*} The Board's own statistics would seem to refute the argument that no useful purpose would be served by requiring the Board to review its Regional Directors' determinations in representation cases. Compare *NLRB v. Olson Bodies, Inc.*, 420 F.2d at 1190 (review of the Regional Director's determination would be "an idle and useless formality").

^{*} These appear to be the only years for which the Board has broken down its statistics into these categories.

II.

We also submit that the middle position urged by the Second Circuit in *Olson Bodies* (i.e., limiting review to cases where the issue "is difficult and requires a fine-drawn balancing of facts and law") should be rejected on the ground that it provides a wholly unsatisfactory standard for determining when plenary review is required by the Board. The *Olson Bodies* standard is too subjective, and worse yet, it is hopelessly unwieldy. As the First Circuit stated in *Magnesium Casting*:

"The Second Circuit's recent effort—*N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d at 1190—to confine the *Pepsi-Cola* holding seems to us an unsatisfactory compromise: actual Board review and determination is only required where the issue 'is difficult and requires a fine-drawn balancing of facts and law.' We shrink from the prospect of attempting such characterizations; in the case before us involving the issues of 'supervisory' status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question is a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress." 427 F.2d at 121.

Olson Bodies is open to additional criticism on the ground that it makes a distinction which is nowhere au-

thorized in the Act. Section 10(c) of the Act, 29 U.S.C. § 160(c), provides, without exception, that the Board shall decide unfair labor practice complaints. It does not provide that the Board shall hear only those unfair labor practice complaints where the issue "is difficult and requires a fine-drawn balancing of facts and law," *NLRB v. Olson Bodies, Inc.*, 420 F.2d at 1190, or where the issue is a "difficult question of mixed fact and law," *NLRB v. Bayliss Trucking Corp.*, — F.2d at —. If Congress had intended to carve out an exception for unfair labor practices that happen to arise in the context of a representation dispute, it would seem only logical that Congress would have amended Section 10(c), which specifies the procedures that the Board must follow in adjudicating unfair labor practice claims. Congress, of course, has done nothing of the sort. Indeed, Congress has repeatedly rejected proposals which would have permitted the Board to delegate decision-making power in unfair labor practice cases to its subordinates. See Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners*, *supra*.

The only other argument advanced in support of the *Olson Bodies* rationale is that there may be some instances where remand for review of the Regional Director's decision would be "an idle and useless formality," 420 F.2d at 1190, citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n. 6 (1969) (opinion of Mr. Justice Fortas), presumably because the Board would automatically defer to the Regional Director's decision. The argument is based on a kind of omniscience that few courts can be expected to possess. See Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U.L.Rev. 201, 203 (1970). The argument, moreover, is refuted by the Board's own experience. In *NLRB v. Smith Industries, Inc.*, 403 F.2d

889 (5th Cir. 1968), for example, the Fifth Circuit remanded an unfair labor practice case to the Board, and directed that a hearing be held. The hearing was held, and the trial examiner found that no prejudicial conduct had occurred during the representation election involved. *After examining the entire record, the Board itself reversed the trial examiner's findings, invalidated the certification and dismissed the unfair labor practice charge. Smith Industries, Inc., 72 L.R.R.M. 1068 (1969).* In short, there is no basis for assuming that the Board will inevitably endorse the decision of its Regional Director.

The solution proposed in *NLRB v. Bayliss Trucking Corp.*, — F.2d — (limiting review to cases where the issue is "a difficult question of mixed fact and law") fares no better. In the typical representation election, questions of law (*e.g.*, the appropriateness of a bargaining unit, the propriety of pre-election campaign tactics) are inevitably questions of fact;* and in this sense, nearly every representation case presents difficult questions of mixed fact and law.

In *Pepsi-Cola*, for example, the Regional Director determined that 54 soda distributors were employees rather than independent contractors, and hence should be included in a bargaining unit consisting of distributors and driver salesmen. In order to resolve the question, it was neces-

* As Prof. Wellington has noted:

"The Board has a number of criteria it employs in determining the appropriate unit. These include: the bargaining history of the parties; bargaining practices, where they exist, in similar establishments; the organizational arrangement of the employer's establishment; the community of interest of the employees and their physical proximity to one another; and the ability and willingness of the union to represent certain employees." Wellington, *Labor and Legal Process* 44 (1968).

sary for the Regional Director to determine whether the facts which suggested that the soda distributors were independent contractors (*e.g.*, distributors were not eligible for employee benefits such as vacation or sick pay, hospitalization, and insurance) outweighed the facts which suggested that they were employees (*e.g.*, distributors sold soft drinks at prices and terms fixed by the company). If it had been determined that the soda distributors were independent contractors, they could not have been included in the bargaining unit and would not have been eligible to vote in the representation election.

In *Olson Bodies*, the Regional Director determined that Davenport was not a plant clerical employee and was thus ineligible to vote in the representation election. In order to resolve the question, it was necessary for the Regional Director to determine whether the facts which suggested that Davenport was a plant clerical outweighed those which suggested that he was not. In this sense, *Olson Bodies* and *Pepsi-Cola* are indistinguishable.*

In at least one respect, *Olson Bodies* presents a stronger case for Board review than *Pepsi-Cola*, since the issue in *Pepsi-Cola* (*i.e.*, whether the "soda distributors" were employees or independent contractors) involved applying principles derived from the common law of agency. See *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968). As the court noted in *Pepsi-Cola*, this is "a law which the

* Any distinction between "unit determination" and "unit placement" is frivolous. Either issue may be decisive to the outcome of an election. See Wellington, *Labor and the Legal Process* 44 (1968). By determining the appropriateness of the bargaining unit, the Regional Director necessarily enfranchises certain employees for collective bargaining purposes and disenfranchises others. "[S]election of an appropriate bargaining unit gives the majority of employees within that unit the bargaining representative they desire." *NLRB v. Purity Food Stores, Inc.*, 376 F.2d 497, 501 (1st Cir.), *cert. denied*, 389 U.S. 959 (1967).

court might apply as effectively as the Board." 409 F.2d at 680, n. 6. In contrast, the question of Davenport's right to be included in the bargaining unit requires a large measure of informed discretion on the part of the Board, *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947), and resolution of that question will depend on whether there is a substantial "community of interest" between Davenport and the other plant clericals. *NLRB v. Belcher Towing Co.*, 284 F.2d 118, 121 (5th Cir. 1960). Since the "community of interest" calculus depends on the interaction of a large number of variables, this is precisely the kind of question that should be reviewed by the Board itself rather than a functionary whose appointment is not even subject to consideration by the Senate.

III.

In *Pepsi-Cola Buffalo Bottling Co. v. NLRB*, *supra*, the Second Circuit held that where the employer refuses to bargain in order to challenge the Regional Director's representation decision, the Board itself must review the record on which the representation decision is based "before taking the serious step of declaring that the employer has committed an unfair labor practice." 409 F.2d at 680. We believe that *Pepsi-Cola* was correctly decided, and respectfully urge that this Court follow the rationale of *Pepsi-Cola*.

In *Pepsi-Cola*, the court specifically rejected the argument that amended Section 3(b) authorized the Board to delegate the power to decide unfair labor practices, stating:

"[Amended Section 3(b)] does permit the Board to delegate determination of appropriate bargaining units to a regional director. *But this determination does not have the serious consequences that a finding of an*

unfair labor practice does. The purpose of the provision added by House and Senate conferees late in the gestation period of the 1959 amendments to the Labor Act, was to speed the work of the Board. At the same time, however, Congress indicated that the regional directors would be kept in check by permitting review of their decisions by the Board itself." 409 F.2d at 680-81, n. 7 (emphasis supplied).

This analysis, of course, is consistent with Congress' persistent refusals to enact legislation permitting the delegation of Section 10 powers. See Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners*, *supra*. "It is fair to say that in all this Congress expressed a mood," *Universal Camera Corp. v. NLRB*, 340 U.S. at 487, and it is also fair to say that *Pepsi-Cola* is faithful to the Congressional mood.

As the author of *Pepsi-Cola* has noted, the advantages of Board review are twofold. It provides a reviewing court with the benefit of the Board's own opinion and experience,* and acts as a deterrent to unjustifiable agency action. See Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, *supra* at 205.

It should be noted that if the unfair labor practice did not arise out of a representation dispute, the employer would have been entitled to full review by the Board, 29

* As Prof. Winter has noted:

"The task of the courts is not to weigh their experience against that of the Board but, first, to compel the Board to state clearly what its experience has been, what inferences it has drawn from that experience, and what impact those inferences should have in the particular case and, second, to decide whether on that basis each decision is a reasoned one." Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 Sup.Ct.Rev. 53, 69.

U.S.C. § 160(c), and as the court observed in *Pepsi-Cola*, "The consequences of committing an unfair labor practice are the same no matter what the source of the dispute." 409 F.2d at 689. It should also be noted that Congress, in enacting 29 U.S.C. § 160(c), was aware of the delays inherent in the processing of unfair labor practice complaints. As this Court declared in *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-78 (1964):

"That this indirect method of obtaining judicial review imposes significant delays upon attempts to challenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress explicitly intended to impose precisely such delays."

It is true, of course, that the effect of *Pepsi-Cola* may be to add to the Board's admittedly heavy workload. See Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, *supra* at 207. Administrative shortcuts, however, are not the solution to the Board's workload problem. As the First Circuit stated in *NLRB v. Trancoa Chemical Corp.*, 303 F.2d 456, 461-62 (1st Cir. 1962), "Arguments that [administrative agencies] are too busy to do their duty, . . . or that it is more expeditious not to recognize rights, are not very agreeable ones."

Conclusion

For the reasons stated herein, as well as those stated by the petitioner, the judgment of the First Circuit in No. 370 should be reversed.

Respectfully submitted,

WILLIAM L. DENNIS

80 Pine Street

New York, New York 10005

Attorney for Amicus Curiae

Olson Bodies Inc.

Of Counsel:

DAVID A. MEAD

LAURENCE T. SORKIN

CAHILL, GORDON, SONNETT, REINDEL & OHL

80 Pine Street

New York, New York 10005

November, 1970